REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court

OF THE

STATE OF LOUISIANA

SUPREME COURT——WESTERN DISTRICT,
ALEXANDRIA,..... OCTOBER, 1830.

Western District.
October, 1830.

MONTGOMERY
vs.
RUSSELL.

MONTGOMERY vs RUSSEL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

In examining the evidence upon which the jury acted, if the Court is unable to concur with the jury in opinion—it will, in accordance with its usual practice remand the cause for a new trial, and the opinion of another jury.

Thomas for plaintiff. This is a suit brought to recover from the defendant Russell, the amount of two security bonds, with interest, damages and cost, which the plaintiff had to pay for Russell in the state of Alabama.

In the Court below, the jury found two verdicts—one for $3,515 19, interests and costs, the amount of one bond;—the other for $1,621 with like interests and costs, being the amount of the second bond. On the two sums thus found, the Court gave judgment.

The defendant had set up a claim for certain property on Dog river, near Mobile Point, which he had conveyed to the plaintiff for $4000. This the plaintiff contends was intended to indemnify him against other securities and respon-

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sibilities he was under for the defendant, and which he had paid. It is shewn by the evidence in the cause.

C. T. Scott for defendant. The Dog river property was conveyed to the plaintiff to secure him against all his *liabilities* for the defendant. It was valuable and abundantly sufficient for this purpose, and has never been accounted for by Montgomery.

1. The defendant has the right to enquire into the validity of the judgments on the security bonds in Alabama, upon which the verdict and judgments are based in this Court. The original security bond should have been produced on the trial here, as the best evidence, and not a transcript copy. La. Code, art. 3005.

2. The security bond in the second case was originally given in Alabama for the hire of African slaves, and was illegal and void, because given for the hire of property illicitly brought into the country. The principal being absent at the time a recovery was had on it, Montgomery the security was remiss in not preventing such recovery. The validity of such judgment was a subject of proper enquiry here, and the verdict and judgment rendered on it illegal. La. Code, 3005. 6 Toullier 191, 183.

Martin J. delivered the opinion of the Court. This case was remanded from this Court at October term 1828—see 7 Mar. n. s. 288.

This case was remanded to have it ascertained whether the property conveyed to the plaintiff was for the purpose of securing him against any debts he might be compelled to pay for the defendant.

In examining the evidence upon which the jury acted, if the Court is unable to concur with the jury in opinion—it will in accordance with its usual practice, remand the cause for

The jury seem to have implied it was not. In this conclusion after a close examination of the evidence, we are unable to concur. In such a case, it is our practice so far to regard the verdict of a jury as to forbear acting in opposition to it, and to send the case back for the opinion of another jury.

It is therefore ordered, adjudged and decreed that the judgment be annulled, avoided and reversed—the verdict set aside and the case remanded for a new trial. The appellee paying costs in this Court.

a new trial, and the opinion of another jury.

SCOTT vs. CALVIT & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

An instrument of writing under private signature, and not proved by the subscribing witness, is still admissible as evidence of title where it had been four years subsequent to its date, recognised by authentic act; but it will only take effect from the latter date, without proof being made of the original deed.

At a probate sale where property is struck off to the brother of the Parish Judge who makes the sale, the latter may take a conveyance, and receive a valid title to the thing sold, without being considered a purchaser at his own sale.

But admitting it to be proved that the brother of the Parish Judge bought the property expressly for the latter, the nullity occasioned thereby, would be only *relative*, and could be taken advantage of only by the heirs, or creditors of the succession sold.

The plaintiff Thomas C. Scott claims 300 acres of land on Bayou Rapides adjoining himself above and the defendant Calvit below. It was confirmed to one Kilgour by virtue of a Spanish grant. After several conveyances, it came into the possession of Wm. Murray deceased, and at the probate sale of his succession C. T. Scott, (the brother of the plaintiff, and the Parish Judge who made the sale,) became the purchaser. He conveyed it to the plaintiff. It was held by the plaintiff, and those under whom he claims for 20 years, until the defendant Calvit took possession of 200 acres, in virtue of a sale from A. M'Nutt, the other defendant, who is cited in warranty.

The defendants set up older titles, and plead the ten and twenty years prescription. The confliction of these respective claims, and titles of the parties can only be understood

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by an actual inspection of the maps and plots of survey made out, and filed in the cause.

Flint for plaintiff, exhibited title and a plat or map of survey, to shew the correctness and superiority of plaintiff's claim to the land in dispute, and the correctness of the judgment of the Inferior Court.

Winn for defendant, explained from the maps and plots of survey and title papers, the reason why the defendant should hold the land in controversy,

2. He urged, the sale to the plaintiff was invalid, because in effect made to himself as Parish Judge through the agency of his brother.

Mathews Judge, delivered the opinion of the Court.

In this case the plaintiff claimed from the defendant, a certain tract of land as described in his petition for which he obtained judgment in the court below, and the defendants appealed.

Both parties claim title to different parts of an entire tract granted to Joseph Kilgour, the original vendor.

Several objections was made on the trial of the cause in the District Court to the manner in which the plaintiff deduces his title. The first was to the admission of a writing under private signature as not being established by the best evidence, in consequence of the plaintiff not having produced one of the subscribing witnesses to the deed.

An instrument of writing under private signature, and not proved by the subscribing witness, is still admissible as evidence of title, where it had been four years subsequent to its date, recognized by authentic act; but it will only take effect from the latter date, without proof

This instrument was about four years after its date recognized by the seller in an authentic act, and from this last date must take effect without proof of the original deed.

A second exception was taken to the last link in the plaintiff's chain of title; and in support of this exception it is alledged that he was in reality a purchaser at a probate sale made hy himself as a Judge in that capacity, although the property was struck off to his brother, C. T. Scott, and afterwards conveyed by the latter person to him. The evidence of the case does not clearly establish this fact: and if it did, we incline to think that the nullity occasioned by it

would only be relative—to be taken advantage of by the heirs or creditors alone, of the succession which was sold.

In testing the correctness of the judgment of the Inferior Court, we shall consider the title under which the defendants claim, as the oldest. It was passed by authentic act on the 18th of June 1810. The *recognitive act* which is the commencement of the plaintiff's title in relation to third persons, was executed on the 22d September 1812.

The decision of the case depends principally on the construction which ought to be given to the original deed of sale under which the defendants' claim.

It purports to convey 132 American acres of land, to be taken, beginning at the lower limits of the vendors' tract, with one equal proportion of front on the Bayou, and depth agreeable to the whole quantity left of said tract of land; reserving to himself 20 arpens front in such a manner as to have 300 American acres, superficial, agreeable to the Spanish custom of surveying.

The testimony of M'Crummin a Deputy surveyor of the United States, shows that according to the Spanish mode of surveying, he surveyed for the plaintiff about 20 arpens front, which gives to him only the quantity of superfices called for by his title. Kilgour in his sale, under which the defendants make out their title, reserved to himself 20 arpens front, to make, with the depth which appertained to his land, 300 superficial acres—selling 132 with a front proportionate to the whole front of his land, which according to a plat made by Stone, a surveyor, and by which he sold, appears to be about 30 arpens—of these thirty, the defendants seem to hold eight or ten, being their proportion. The balance remained to the vendor, which has since passed from him to the plaintiff without prejudice to the claims.

It is therefore ordered adjudged and decreed that the judgment of the District Court be affirmed with cost—reserving to the defendants their right to claim in another action the value of the improvements made by them on the land and recovered by the plaintiff, if any they have.

being made of the original deed.

At a Probate sale where property is struck off to the brother of the Parish Judge who makes the sale, the latter may make a conveyance, and receive a valid title to the thing sold without being considered a purchaser at his own sale.

But admitting it to be proved that the brother of the Parish Judge bo't the property expressly for the latter, the nullity occasioned thereby would be only *relative*, and could only be taken advantage of by the heirs or creditors of the succession sold.

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STEWART
vs.
CARLIN & AL.

STEWART vs. CARLIN & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

When interrogatories are propounded to the plaintiff to be answered *in open Court*, and no day moved for and fixed by the Court on which to answer; the plaintiff's neglect to answer will not authorise the interrogatories to be taken for confessed.

When the defendant annexes interrogatories to his answer and prays "that the plaintiff may be ruled to answer them *in open Court*," he must according to the provision of the 351st Article of the Code of Practice, move the Court to appoint a day for the plaintiff to appear and answer; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering.

Dennis Carlin executed his note to Dr. Stewart on the 13th of May 1829, for $227—payable on demand with ten per cent interest until paid.

The note was given for medical services. The defendant alledges that there was an understanding between him and the plaintiff that payment was not to be demanded until the ensuing year: and that notes and accounts on other persons were to be taken in payment. That the medical charges were exorbitant and the note only given to settle and liquidate the account. The defendants put interrogatories calling on the plaintiff to *say on oath in open Court*, if the foregoing statement is not true, and that this agreement took place. The interrogatories were not noticed or ordered by the Court to be answered. The plaintiff had judgment for the amount of the note and interest. Carlin appealed.

Dunbar and Wilson argued for the plaintiff.

Briggs and Winn for defendant.

Martin J. delivered the opinion of the Court.

This is an action on a promissory note. The defendant pleads the general issue; and that the plaintiff agreed to suspend his right of sueing for a period not yet expired.

There was also a plea of reconvention. His counsel in

this Court urged that interrogatories were put to the plaintiff in the answer, to which the necessary affidavit was annexed. That the plaintiff did not object to answer any of these interrogatories—that therefore they ought to have been taken as confessed; had they been, the verdict must have been for the defendant. Code of Prac. Art. 350.

It may be true that when the defendant does not seek to avail himself of that part of the Code of Practice, (art. 350) which authorises him to require, that interrogatories be *answered in open Court and in his presence*: and the plaintiff files his objections, the interrogatories must be answered without the intervention of any order of Court. But when the party avails himself of the 351st Article, the answer must be given *on* the day appointed to that effect by the Judge.

In the present case the defendant in his answer prayed that the plaintiff might be ruled to answer upon oath, *and in open Court*. He had no right to do so, except under the 351st Article of the Code of Practice; and that imposes on the plaintiff the obligation to appear in open Court, and answer on the *day appointed to that effect* by the Court. The defendant was therefore bound to move the Court to appoint a day. His neglecting to do so, dispensed the plaintiff from the obligation of appearing; and by proceeding to trial without procuring the appointment of a day, the defendant waived his right to the plaintiff's answer to the interrogations.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

When interrogatories are propounded to the plaintiff to be answered *in open Court*, and no day moved for and fixed by the Court on which to answer; the plaintiff's neglect to answer will not authorise the interrogatories to be taken for confessed. When the defendant annexes interrogatories to his answer and prays "that the plaintiff may be ruled to answer them *in open Court*," he must according to the provision of the 351st Article of the Code of Practice, move the Court to appoint a day for the plaintiff to appear and answer; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering.

CARLIN vs. STEWART & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Actions for slander and defamation may be sustained under our Civil Code, without resorting to the Civil Laws of other countries, which are said to be repealed by our Statute of 1828.

In actions of slander and defamation of character, the jury or Court must

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often allow damages, when no special damage is shown to have been sustained.

Professional men are often unable to exhibit positive proof of the injury done to their reputations by malicious persons and slanderers, and would be in many cases absolutely remediless, if a jury or a Court are not allowed to find a guide in the dictates of their consciences.

On the score of the quantum of damages the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand.

Carlin instituted suit to recover damages of Stewart for calling him "*a perjured villian*" and laid the damages at $5000.

Dr. Stewart had given medical attendance to a negro woman, a nurse, belonging to the estate of Curtis', but who lived in Carlin's family at the time. His bill amounted to $56. He called on Carlin, whom he believed was cognizable to all the facts, and would prove his account to the administrator of Curtis's estate. The witness said the bill was exorbitant. That Dr. Stewart had only visited the negro once when first called in, and gave two way visits. When Carlin had thus testified, the Doctor became enraged, and declared publicly that Carlin had swore to a lie! "that he was a purjured villian!"

The defendant plead not guilty—and was permitted to call witnesses to show that his bill for medical services was reasonable and just—consequently he had good reason for believing as true what he charged upon Carlin.

The testimony shows that Doctor Stewart uttered the slanderous words in great haste and in the heat of passion. It also appears in proof that the plaintiff sustained no real injury by the slander. That those who knew him did not believe the charge to be true. It excited some little feeling in his favor, and was rather an advantage than an injury to him. It was likewise in proof that Stewart had attended faithfully to the negro he was called in to see. That she had a very severe attack, and it was the opinion of one or two witnesses who saw her, that it must have required great skill and attention to save her life.

The jury however found a verdict of 1000 dollars for the plaintiff. It appeared from the record that the verdict was given in by the Jury on the 3d of May—judgment rendered on the verdict and *entered upon the minutes*, the 7th of May and signed by the Judge the same day. A motion for a new trial was made on the 10th and 11th of May—which was overruled as not being made in time. The defendant appealed.

Briggs and Winn for the plaintiff; contended that the action for slander, and the finding exemplary damages should be maintained and was properly brought. 5 Black. Com. 334. Code of Practice Art. 554 was cited to show the motion for a new trial was not in time.

Dunbar for defendant. This action can only be sustained on the article 24 of the La. Code; as no special damage was proved none can be recovered. Pandects Françoises 10 Vol. 82 391. 11 Toullier 154. 4 Martin Rep. Juris. 25.—Clef de Loi Rom. 63 112 132.

The motion for a new trial was in time. Three whole days between the rendition of Judgment and signing must be allowed to move a new trial. It may be moved for and granted at any time before signing judgment even after the three days between rendering it on the minutes, and signing it may have elapsed. 5 Mar, N. S. 319.

Martin J. delivered the opinion of the Court.

This is an action of slander for calling the plaintiff "*a purjured villian.*" The plaintiff had a verdict and judgment for 1000 dollars. The defendant made an unsuccessful effort to obtain a new trial—and appealed from the decision of the District Court refusing it.

The appellees counsel has contended the motion came too late, and if it had been in time, ought to have been rejected.

We have examined the case in the point of view most favorable to the appellant,—as if the motion for a new trial had been in time.

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The appellants' counsel has urged that since the repeal of our former civil law, we are without any remedy in cases of defamation; at least in cases where special damage is not proved.

The appellee's counsel has referred us to the case of Stackpole, *vs.* Henen. 5 Mar. N. S. 481, in which the action of slander seems to be recognized by this Court, and an act of the legislature passed at the following session of the legislature, bottomed on our decision. He has also cited the 21st, and the 2295th articles of the Louisiana Code.

Actions for slander and defamation may be sustained under our Civil Code, without resorting to the civil laws of other countries, which are said to be repealed by our statute of 1828.

It is useless in the present case to enquire whether the repeal of the civil laws by a late act of the legislature, extends to any other but statutory laws. The parts of the Code relied on, would simply of themselves, authorise our Courts to sustain actions of slander.

In actions of slander and defamation of character, the jury or Court must often allow damages, when no special damage is shewn to have been sustained.

In such actions the jury or Court, must, in many cases allow damages when no special damage is shewn.

Professional men are often unable to exhibit positive proof of the injury done to their reputations by malicious persons and slanderers, and would be in many cases remediless, if a jury or a Court are not allowed to find a guide in the dictates of their consciences.

If a professional man is maliciously, and without cause, charged with being absolutely ignorant of the first principles of the science he professes, he cannot administer positive or direct evidence of the injury he may have sustained. He must be in many cases without any adequate remedy at all—if the jury or a Court may not find a guide in the dictates of their own consciences.

On the score of the quantum of damages, the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand.

On the score of the quantum of damages, the jury were the legitimate judges, and we are unable to say they erred.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

FRANKLIN vs. ALEXANDER & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The execution of a note upon which suit is founded being established, and its consideration shewn; the plea of usury set up against it appearing unfounded, judgment for the amount of the note, interest and cost will be affirmed

The note sued on was dated, February 19th., 1825, and had been given on a settlement between the parties for the balance due for the purchase of 8 slaves by the defendants from the plaintiff. The note was given for $2,103 78 with interest at 10 per cent. until paid. It was given after several renewals of previous notes, in which it clearly appeared from the record, that coventional interest had been faithfully and correctly computed.

The defendants set up in defence, a redhibitory defect in one of the slaves, which was wholly unsupported by testimony.—Also, that the plaintiff gave a written act of sale, which was without date and thereby incomplete, and prayed for its completion before they should be compelled to make payment. Finally, exception was taken to the plaintiff's answer to interrogatories as evasive and not categorical.

A motion for a new trial was made and overruled.

Wilson & Flint argued for the plaintiffs.

Patterson for defendants.

Martin J. delivered the opinion of the Court.

The defendants sued on their note, pleaded the general issue and a want of consideration.

Judgment was given against them and they appealed.

The execution of the note is established, and the considration is a balance due for the purchase of sundry slaves. The plea of usury is not supported.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs in both Courts.

The execution of the note upon which suit is founded being established, and its consideration shewn; the plea of usury set up against it appearing unfounded, judgment for the amount of the note, interests and cost will be affirmed.

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M'LAUGHLIN
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M'LAUGHLIN vs. RICHARDSON & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT THE JUDGE OF THE FIFTH PRESIDING.

Questions of fraud partake of both law and fact—of acts done, and their want of conformity to morality and established law, prescribing the rules by which property is held.

A sale which is merely fictitious, the fraud and nullity may be only relative—and such sale might be good as a donation, or only void as to previous creditors.

But when a sale is made with the avowed *intention* to *defraud*, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it *null* and *void* to all intents and purposes.

The plaintiff and George Hamilton, one of the defendants intermarried the 4th of June 1814. On the day of marriage, previous to its celebration, articles of marriage contract were entered into between the parties, in which the wife is made to bring into the marriage 17 negroes, specified by name, estimated at $5,000—subject to an incumbrance of $2,500, which she owed on them : and also 500 dollars in other property. Hamilton stipulated to bring in a plantation of 1000 arpens of land, estimated at $3,000—stock and farming utersils worth $1500 and notes and credits to the amount of $3,000.

The day before the celebration of the marriage and of making the marriage contract, Hamilton sells to his intended wife these very 17 negroes, which *she* the next day brings into marriage, for the alledged consideration of $5,500. Three thousand dollars acknowledged to be paid, and her two notes taken for $1,250 each, for the remainder.

On the 18th of December 1816. Hamilton and wife executed an act of sale to R. D. Richardson & S. W. Downs, by which they sold and conveyed the plantation, stock farming utensils and 34 negroes (being the 17 sold by the husband to the wife before marriage and their increase)—the whole for $16,000.

In May 1829, the wife commenced the present suit against

her husband for a separation of property, and against Richardson for the negroes, alledging her right of mortgage on them.

In the course of the trial the defendant Richardson made an affidavit that one Pierre Soubercase, since removed to the Kindom of France was a material witness, to prove that the sale of the 17 negroes from Hamilton to his wife the day before marriage," was made in fraud, without consideration, and with *the avowed intention to defraud.*"

It was admitted on the record that "*the facts set forth in this affidavit are true.*" This admission appeared by plaintiff's counsel and was not denied by her.

The parties went to trial, and the Judge charged the jury "that they should take this admission of fraud entire. That it was general i. e. the contract was made in fraud. If fraudulent because the price was not paid, then it might be good as a donation between the parties. The want of consideration would render the sale *fraudulent and void*, against creditors and others having a right *at that time*, but not against others requiring rights &c."

There was a verdict and judgment for the plaintiff—the defendant Richardson appealed.

Winn; *Flint and Thomas* for the plaintiff.

Contended 1st.—that the appeal bond was insufficient because it was made payable to M. A. L. Hamilton, instead of "*M. A. L. McLaughlin*" the maiden name of the plaintiff and the one in which suit is brought.

2. That the property brought by the wife into marriage was *dotal ;* and that no particular form of expression is necessary to constitute a *dot*—and being such, could not be alienated by the wife, only in particular cases, this not being one of them. Civil Code 326. Art. 16 and 34—4 Martin Rep. 181.

Bullard, Downs and Scott, for defendants.

1. The sale of the 17 slaves from Hamilton to his in-

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tended wife, the day before marriage was *fraudulent* and *simulated*.

2. The marriage contract does not designate in what character or quality, the property is brought into marriage. It must expressly state that it is brought to support the marriage, to constitute it a dowry. Civil Code 324 Art. 12. 4 Partida. Tit. 11. Laws 2 10 11 12 13 15 and 17.

Mathews J. delivered the opinion of the Court.

This suit is brought for the purpose of obtaining by the plaintiff, a separation of property from her husband, Hamilton, and to recover from the defendant Richardson, certain slaves described in the petition, which she claims as dower, and which she alledges were illegally sold and transferred by her husband to said defendant.

The cause was submitted to a jury in the Court below who found a verdict for the plaintiff, and from a judgment thereon rendered, Richardson appealed.

The material facts of the case are established by written documents. 1. A sale from Hamilton to the plaintiff of the slaves now claimed by her, dated on the 3d of June 1814. 2. A marriage contract entered into between her and Hamilton, in which it is stated that she brought to the community of the marriage the identical slaves acquired from her intended husband, by the sale executed on the day preceding that of this contract which was made on the 4th of June 1814. 3. A sale executed before a notary by Hamilton and his wife to the defendant Richardson & S. W. Downs, in which the slaves now in question purport to have been sold and made, which the appellant claims title to. them.

On these facts the principal allegations opposed to the plaintiff's right to recover are—1. the nullity of the sale from Hamilton to her on account of simulation and fraud. 2. That the marriage contract by its term created no constitution of dowry, but only amounts to an acknowledgment or recognition of the property which each of the contract-

ing parties brought into community at the time of the marriage.

From this defence, our first inquiry relates to the act of sale, by which the wife acquired the slaves said to have been constituted as a dowry in the marriage contract. And according to our conclusion on this subject will depend the necessity of examining a second question relative to the character of this property whether dotal or paraphernal?

Questions of fraud partake of both law and fact—of acts done and their want of conformity to morality and established law prescribing the rules by which property is held.

Questions of fraud necessarily partake both of law and fact; of acts done and their conformity with morality and established laws by which property is held. In the present case the jury found their verdict under a charge from the Judge, on an admission by the plaintiff, that the sale by which she pretends title to the property claimed as dower, was feigned and fraudulent; and was *made with the avowed intention to defraud*. Notwithstanding this general admission he seems to have instructed the jury that they might consider fraud as relative; and that it could only be alledged by creditors of the vendor previous to the act of sale—and that although void as a sale, it is valid as a donation. In this respect we differ in opinion with the Judge *a quo* as to the legal effect of this instrument. Had it been merely fictitious, his conclusion would perhaps be correct. But surely no system of jurisprudence founded on equality and justice, can tolerate and give validity to acts avowedly made with the intention to defraud. The admission is so contaminating, so explicitly immoral, that it must entirely vitiate the contract and render it *null* and *void* to all intents and purposes.

A sale which is merely fictitious, the fraud and nullity may be only relative—and such sale might be good as a donation, or only void as to previous creditors.

But when a sale is made with the avowed *intention* to *defraud*, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it *null* and *void* to all intents and purposes.

Considering the question of fraud in this case as one entirely of law, arising from the admission of facts by the plaintiff, we deem it useless to send the cause back to be tried by another Jury.

Under this fraudulent sale the appellee acquired no title in the slaves which it purports to transfer to her. They still remained the property of Hamilton—were his at the time of

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the sale made by him and his wife to the appellant and others who have thereby acquired title, &c. As to that part of the judgment which decrees to the wife five hundred dollars, as regards the husband, it is clearly correct, whether the property on which it is based be considered either as dotal or paraphernal. But we are of opinion that the question of privilege or mortgage on property sold and transferred by her husband should be left open.

This view of the case renders useless any inquiry into the character of the property alledged to have been settled as dower.

In relation to the objections made to the appeal bond on account of a misnomer of the obligee, we are of opinion that they cannot avail the appellee. The person to whom it is made payable is sufficiently designated. In the course of the proceedings, the plaintiff assumes the names alternately of M. A. L. McLaughlin, wife of Geo. Hamilton, or M. A. L. Hamilton, taking the sirname of her husband as is customary amongst the population of the English origin. The principal use of names is to identify persons, and the identity required in the present instance is to ascertain that the plaintiff M. A. L. is wife of Geo. Hamilton.

It is therefore ordered adjudged and decreed that the judgment of the District Court be avoided, annulled, and reversed; and it is further ordered &c, that Judgment be entered for the defendant and appellant R. D. Richardson with costs in both Courts; and that the plaintiff do recover from her husband Hamilton, five hundred dollars, &c.

CRAIN vs. BAILLIO & AL.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Compensation cannot be pleaded in cases of insolvency when the claim of the debtor to the insolvent, proposed to be compensated, has been acquired by such debtor, subsequently to the failure of such insolvent.

A claim due from an insolvent debtor to a partnership firm cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent.

Richard W. Kay owed the estate of Jas. H. Gordon, deceased, $765, for which he executed his three notes for $255 each, dated January 15, 1820, payable in 1, 2 and 3 years from the date, with ten per cent interest from the date until paid. The notes were drawn payable to Maria C. Gordon, widow and administratrix of her husband's estate. Kay also gave a mortgage on a lot of ground in Alexandria, to secure the payment of these notes, it being the lot sold to Kay by Gordon. On the 19th of November 1821, Kay sold and conveyed this lot to Wm. Ship, who afterwards sold it to R. A. Crain the present plaintiff, by deed duly recorded October, 12 1827. On the 3d. of November 1827, Shipp, Kay & Co. transferred all their claims against Gordon's estate, to said Crain; among which was a priviledged one of $303, 70, which had been ordered to be paid as such, by the Court of Probates as far back as April 1820. It appeared never to have been paid by the administratrix. The estate also owed Shipp, Kay. & Co. $500 and upwards, for the purchase of goods. These were all transferred to Crain: and R. W. Kay who first gave his *three* notes and the mortgage on the lot now claimed by the plaintiff, was also a member of the firm of Shipp, Kay & Co.

The notes of Kay, given as above, were delivered up by the administratrix of Gordon's estate, on settling her account, as uncollected debts due it.

The estate of Gordon being insolvent, P. L. Baillio was appointed Syndic by the creditors. The two last notes of Kay still remaining unpaid, on the 19th March 1828, the Syndic obtained an order of seizure and sale against the mortgaged property, now in the possession of Crain, as third possessor.

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Crain obtained an injunction, and set up his claims on the estate of Gordon as assignee of Shipp, Kay & Co. against the demand of the Syndic, arising on the two unpaid notes of Kay with the mortgage on the lot. The injunction was dissolved, and Crain appealed.

Winn for the plaintiff, insisted that Crain having become the *bona fide* owner of debts due by the succession administered by the Syndic, he has a right to sett it off against the claim of the Syndic on the mortgaged property in his possession.

Thomas and *Flint* for defendant, excepted to the sufficiency of the appeal and on the ground :

1. That it is only for *half over the nett amount* of the notes sued on, without *including interest* which had accrued ; and that the appeal ought to be dismissed.

2. The matters now in contestation have already been decided by this Court, in a suit between the same parties, and that it is now *res judicata*. See Crain vs. Baillio, 7 Mar. N. S. 273.

3. The claims of the plaintiff having been acquired since the insolvency of Gordon's succession, the Syndic had no power to admit them in compensation of the debt due the succession.

Mathews J. delivered the opinion of the Court. In this case the plaintiff claimed and obtained an injunction as subsequent purchaser, and third possessor, against an order of seizure and sale, which issued at the instance of the defendant in his capacity of Syndic, &c. and was levied on property which had been sold as part of the succession of the deceased J. H. Gordon, which he represents as Syndic and administrator as an insolvent estate. The case was heretofore before this Court, (7 Mar. N. S. 273) and the capacity of Baillio as Syndic, established and recognized, and cannot now be legally contested. The injunction obtained in the present instance was dissolved by the District Court, from which the plaintiff appealed.

Compensation cannot be pleaded in cases of insolvency when the claim of the debtor to the insolvent, proposed to be compensated, has been acquired by such debtor, subsequently to the failure of such insolvent.

A claim due from an insolvent debtor to a partnership firm, cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent.

The only question which the case presents, relates to the appellants' right to compensate a *priviledged debt*, due from the deceased to Ship, Kay & Co. and regularly transferred to him, since the former judgment rendered by the Supreme Court. It is clear that compensation does not legally take place in cases of insolvency, when the debtor to the insolvent acquires claims against him subsequent to his insolvency. It was decided by our former judgment in this case, that the claim set up in compensation, being due to the firm of Shipp, Kay & Co, could not be pleaded, or allowed in opposition to one by Kay alone, to Gordon's estate.

It is true that the plaintiff has since the purchase of the property seized, and since he became owner thereof, acquired a right to this claim from all the firm of Shipp, Kay & Co. but he acquired this right at *a time when it could not be allowed* in compensation of debts due by Gordon's estate; for it was then insolvent.

It is therefore ordered, adjudged and decreed that the judgment of the District Court be affirmed with costs.

ROSS vs. PARGOUD.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Interest given by a judgment forms a part of it, and must be calculated in, and secured in the appeal bond, which together forms the judgment of the Court appealed from.

There is a clerical mistake, or typographical error in that part of the English text of article 575 of the Code of Practice, which says the appeal must be taken for "one half the amount of the judgment," &c. It should read "*exceeding by one half* the amount, &c."

The appeal bond must *exceed by one half* the amount of the whole judgment appealed from, to entitle the appellant to a suspensive appeal.

And by the article 574 of the Code of Practice, the judge must in all cases, whether it be a suspensive appeal, or merely a *devolutive* appeal, fix the amount of the appeal bond, which is the legal sum.

Winn of Counsel for the plaintiff and appellee, moved to dismiss the appeal in this case—1. Because the appeal bond

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not having been given for the amount ordered by the judge *aquo*.

There being no statement of facts made out according to law.

The order of the judge required the appeal bond to be executed in a sum *exceeding by one half, the amount* of the judgment above rendered, returnable, &c." The judgment was for $1075 together with *judicial interest* from the 2d of October, 1828, and costs." The appeal bond *taken*, was for $1700 only, being $40 less than the principal sum, and *interest* and costs and *one half over* of the judgment.

Flint for the appellant, urged that the appeal bond was given for the sum required by law, and if the judge required a larger sum, than was warranted by the Code of Practice, the party was not bound to give it.

2. The Code of Practice, article 575 provides that the appellant shall give security "for a sum exceeding *one half the amount of the judgment*, &c." In the present case, the appeal bond is even for more than one half over the amount of the judgment.

Martin J. delivered the opinion of the Court.

The dismissal of the appeal is prayed for, on account of the insufficiency of the bond. The Judge required it for a sum exceeding by *one half* the amount of the judgment. In making his calculation the appellant does not appear to have noticed that the judgment was for a principal sum *and interest*. The bond exceeds by one half the principal sum: but not this sum and the interest due at the rendition of the judgment.

Interest given by a judgment forms part of it, and must be calculated in and secured in the appeal bond which together, forms the judgment of the Court appealed from.

There cannot be any doubt that *interest* given by a judgment, is *part* of the judgment, and ought to be secured on an appeal as well as the principal sum.

But the appellants counsel urges that the bond is for the sum required by law, and if the Judge required a larger sum, the party was not bound to give security therefor; and he

has referred us to the Code of Practice, Article 575, which speaks of *a sum exceeding one half the amount* of the judgment.

We believe there is a clerical or typographical error in this part of the Code, and that the intention of the article was as the district Judge has understood it. As far as our knowledge goes, it has been until now understood that the bond should be for "a sum exceeding *by one half* the amount, &c." It is clear either of these articles "*by*" or "*of*" was accidentally omitted.

There is a clerical mistake, or typographical error in that part of the English text of articles 575 of the Code of Practice, which says the appeal must be taken for "one half the amount of the judgment," &c. It should read "*exceeding by one half* the amount, &c."

The French text of this article places it beyond a doubt, that the participle "*by*" was intended. But it is true the English and not the French text, is to govern. In the two next articles, 576 and 577, which treats of judgments for the recovery of slaves, moveable or real property, the appeal bond is required to be for an amount exceeding *by* one half the estimated value of such slaves or moveable property; and in the case of real property, the Code speaks of an amount exceeding by one half of the estimated value of the revenue, &c.

Before the Code of Practice on judgments for the recovery of a sum of money, the appeal bond was required to be for a sum not exceeding double the value of the matter in dispute. Acts of 1813. Ch. 11. See 8. 1 Mar. Dig. 436.

Were we to confine our attention to the Article 575 of the Code of Practice, we might be compelled to adopt the construction contended for by the appellant's counsel, we think that our duty requires our attention should be extended to the following articles of the Code, and the preceding laws; and in doing so we must conclude that the district Judge was correct in requiring security for a sum exceeding by one half the amount of the judgment.

The appeal bond must *exceed by one half* the amount of the whole judgment appealed from, to entitle the appellant to a suspensive appeal.

But the appellants counsel has further urged that he gave security for $1700, and this being evidently more than sufficient to cover costs, he entitled himself thereby, if not to a *suspensive*, at least to an appeal merely devolutive.

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Whether the appeal be intended to be *devolutive* and *suspensive*, or merely *devolutive*, the law requires a bond for a sum to be fixed by the Judge—Article 575. The Judge cannot grant the appeal without fixing the sum in which bond is to be given when he has done so, the sum by him fixed is the legal one, and a bond for a lesser one is not legal.

It is therefore ordered, adjudged and decreed that the appeal be dismissed.

And by the article 574 of the Code of Practice, the judge must in all cases, whether it be a suspensive appeal, or merely a *devolutive* appeal, fix the amount of the appeal bond, which is the legal sum.

WINN vs. SCOTT.

When a Probate Judge proceeds to a public sale of property under his own order of Court, he assumes the character of an auctioneer, and *as such* is not answerable for his conduct except under ordinary proceedings established by Law.

The Article 790 of the Code of Practice does not embrace the issuing a mandamus to compel an auctioneer to do his duty—it only applies to cases which have a tendency to aid the jurisdiction of the Supreme Court, which is appellate only.

This was an application to the Supreme Judge for a mandamus to compel a Parish Judge, acting as auctioneer, to adjudicate to the applicant, a certain piece of property, for which he alledges he was the last and highest bidder.

Winn in *propria persona* applied for a writ of mandamus to compel Thomas C. Scott, the Parish Judge of Rapides, to adjudicate to him and make a good title to a tract of land appraised to 900 dollars. The petitioner alledges that at the sale of the estate of Tabitha Jett, deceased, he became the last and highest bidder for a tract of 225 arpens of land, and that he bid the appraised value thereof, and no one bidding any more, he demanded of the Judge, who refused to adjudicate the land to him and make him a title accordingly. He avers he made a tender of the sum of 900 dollars which the Judge dispensed with, and refused to receive.

The petitioner prays for a writ of mandamus commanding the Parish Judge to adjudicate the land to him and make him a legal title thereto.

Mathews J. delivered the opinion of the Court.

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WINN vs. SCOTT.

This is an application to the Court to issue a mandamus to the Judge of probates for the Parish of Rapides to compel him to convey to the plaintiff a certain tract of land which he alledges he purchased at a sale of the succession of a certain Mrs. Jett.

The article 790 of the Code of Practice is relied on as authorising and requiring the Court of Appeals to issue the process now demanded.

We do not believe this article to be applicable to a case like the present. When a Probate Judge proceeds to a public sale of property under his own order of Court, he assumes the character of a Auctioneer, and *as such*, is not answerable for his conduct, except under ordinary proceedings, established by law.

It is true, that the expressions of the Code of Practice on this subject seems to embrace all possible cases. But the authority there granted, must be considered in relation to the constitution which allows to this Court appellate jurisdiction only: and its mandates should be confined to matters which have a tendency to aid that jurisdiction.

It is therefore ordered, that the plaintiff take nothing by his motion.

When a Probate Judge proceeds to a public sale of property under his own order of Court he assumes the character of an Auctioneer, and *as such*, is not answerable for his conduct, except under ordinary proceedings established by law.

The article 790 of the Code of Practice, does not embrace the issuing a mandamus to compel an Auctioneer to do his duty—it only applies to cases which have a tendency to aid the jurisdiction

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HUGHES vs HARRISON AT AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT THE JUDGE OF THE FIFTH PRESIDING.

A promissory note made payable to order is transferrable by endorsement, only to enable the endorser or assignee, to endorse it over, or to resist the drawer's claim for compensation of sums due him from the transferor, on account of payment made before transfer, or before the note became due.

But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or consignment to trustees.

Parol testimony is admissable to prove the sale and transfer of a note payable to order, without endorsement, or written transfer.

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One of the payees of a promissory note, who together with the other, have sold or exchanged it without recourse on them, is a competent witness to prove the consideration for which the note was given.

Benjamin & Jemima Harrison (the husband and wife) executed their joint promissory note to Ailes & Morris, *or order*, for $482. 16, dated January 1, 1827, payable the 1st. of May following. The note was given for merchandize sold, principally for the *use of the wife* and on her credit. Ailes and Morris sold or exchanged the note with the plaintiff by parol agreement; the latter taking it without recourse on the payees (Ailes and Morris).

Ailes, one of the original payees was called as a witness to prove the consideration of the note. His testimony was objected to, because he was an interested witness; the objections were overruled, and his testimony received. He proved that the goods for which the note was given, were principally furnished to Mrs. Harrison, one of the defendants, at her plantation. That she was separated in property from her husband in October 1827, soon after the execution of the note; and became the separate owner of the plantation and negroes for the use of which, the articles of merchandise for which the note is given, were purchased.

The defendant Harrison plead a general denial. There was judgment for the plaintiff against both defendants *in solido*, for the amount of the note sued on,—they appealed.

R. C. Scott for plaintiffs. This case presents two questions:

1. Can the wife legally bind herself conjointly with her husband for debts contracted during marriage, under circumstances like these: he insisted she could. La. Code—Art. 2412—7 Mar. N. S. 64.

2. Can the holder of a promissory note payable to order, shew by parol testimony that he is the *bona fide* holder of it, without its being endorsed, or any written transfer, and recover on it? He maintained the affirmative. La. Code, 2612.—1. Mar. N.S. 301.

Flint for the defendants, contended for the following positions.

1. The wife cannot bind herself jointly with her husband for debts of his contracting, during marriage.

2. The plaintiff cannot recover because he shews no right of action or of property in the note sued on, either by endorsement or other written transfer. Chitty on bills—146, 155. 162.—La. Code. 1900. 2141.

Martin J. delivered the opinion of the Court. This case was remanded from this Court at its last term. (8 Mar.—N. S. 297). The judgment having been reversed withou there being an answer to the amended petition, or any judgment by default.

On the return of the case to the District Court, the defendants still continuing to neglect to answer, a judgment was taken by default, which was afterwards made final.

The record shews it was admitted the defendants were husband and wife.

Ailes, one of the original payees of the note, deposed that no written assignment of the note sued on was made to the plaintiff; but the witness and Morris the other payee, gave it to the plaintiff in discharge of a debt of Morris, which the plaintiff was authorised to receive; and for which he gave Morris a discharge. Taking the note without any recourse on the witness or Morris. All this was done with the consent of the witness. The articles in payment of which the note sued on was given, were delivered by the witness then in partnership with Morris; and though charged to the husband and wife, were for the use of the wife, her children and slaves, and furnished on her responsibility; the husband being then insolvent and without credit.

It has been contended in this Court that:

1. The note was transferrable by endorsement only.

2. That the witness [Ailes] was incompetent to testify as to the consideration of the note.

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A promissory note made payable to order is transferrable by endorsement only, to enable the endorser or assignee, to endorse it over, or to resist the drawer's claim for compensation of sums due to him from the transferor, or account of payment made before transfer, or before the note became due.

But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or assignment to trustees.

Parol testimony is admissable to prove the sale and transfer of a note payable to order, without endorsement, or written transfer.

One of the payees of a promissory note, who togather with the other, have sold or exchanged it without resourse on them, is a competent witness to prove the consideration for which the note was given.

It is true it is said in the books, promissory notes payable to order, are transferrable by endorsement only: we understand by this that without an endorsement, the assignee is not invested with the right of endorsing over the note, or resisting the drawers claim for compensation of sums due him by the transfer, or on account of payment made before the transfer, and before the note was due. But he certainly can transfer his interest therein without endorsing the note, as is done in the case of a cession of goods or an assignment to trustees for the benefit of creditors. Endorsable paper, passes also by the assignment of law to executors, curators, heirs &c.

An assignment of personal property may be proved by witnesses.

Ailes, the witness appears from his testimony to be totally desinterested. The note having been taken by the plaintiff without any recourse. He therefore was competent to prove the consideration of the note.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

HARRISON & AL. vs. FAULK & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser of the claimant the value of such improvements.

There is no privity of contract between the parties, after the lands have passed into the hands of subsequent purchasers; and the party evicted has no lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land.

The present plaintiffs were sued and evicted from their possession of 240 arpens of land by Arpines' heirs. They omitted in their defence to claim the value of the improvements they had put on the land, and which had not been allowed in the judgment and eviction. Arpines' heirs sold

the land and improvements by them recovered, to the defendants, who dispossessed Harrison and wife without paying them for their improvements. This suit is brought to recover them from the present defendants as the actual possessors, &c.

There was judgment of non-suit against them and they appealed.

Winn for the plaintiff; insisted that the claim for improvements is a real right following the land, and must be paid for before the land can be taken, &c. La. Code. Art. 3416. *Poth. de prop.* No. 344–5. 9 Mar. 348. La. Code 2012. 3413.

Flint and Downs for defendants. The plaintiffs have lost all right and claim to damages for improvements put on the land, by suffering possession to be taken from them without asserting such claim. They can have no tacit lien or mortgage for remuneration, when no claim is asserted in the suit of eviction. La. Code. 3288–9.2007.

Martin J. delivered the opinion of the Court.

The plaintiffs claim the value of improvements made by them, while they were *bona fide* possessors of a tract of land which has since been recovered from them by the legal owners of it, the heirs of Arpine : and who afterwards sold it to one of the defendants, with all the improvements, without any mention or notice of the plaintiff's claim. He resisted it on the ground of absence of any liability on his part. The other defendant disclaimed any right and avowed himself the tenant of his co-defendant. There was judgment against the plaintiffs and they appealed.

A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser the value of such improvements.

There is no privity of contract between the parties, and if the plaintiff's claim succeeds it must be on the ground that the claim entitles them to a legal or tacit mortgage. But there are now no such mortgages—except in the cases in which it is recognised in the new Civil Code. Articles—3280—3288. The present is not one of these.

There is no privity of contract between the parties, after the lands have passed into the hands of subsesequent purchasers; and the party evicted has no

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lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land.

A claim for the value of improvements gives no real action. La Code 2007, 2009, 2010 and 2014. The cases of Labrie vs. Filiol—9 Mar. 348—and Stafford vs. Grimball, 1 Mar. N. S. 554, do not support the plaintiff's pretentions. In the first the improvements had not been sold with the premises. In the second there was a stipulation and charge imposed on the premises.

Both of these cases were decided before the promulgation of the new Civil Code of Louisiana.

It is therefore ordered, adjudged and degreed, that the judgment of the District Court be affirmed with costs.

GRAYSON vs. WOOLDRIDGE & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where slaves are hired out for a term which is unexpired, and in the mean time the owner sells them to another, if such purchaser take them from the person to whom they were hired before the term expires, he will be answerable in damages as a trespasser.

In an action of trespass it is not necessary to state the trespass happened in any particular part of the Parish; because had it been stated, evidence that the trespass was committed in some other place in the Parish would have been good, *even in criminal cases.*

The plaintiff who was no party to the deed of sale between Wooldridge and Bowden was a competent witness to prove the declaration of Wooldridge's vendor, to show Wooldridge's knowledge of the plaintiff's right to retain the negro on hire.

The petitioner Grayson hired two negro boys from Bowden, one of the defendants, to continue from January 1829, to January 1830. On the 15th of October 1829, James A. Wooldridge one of the defendants, came to the plaintiff's plantation & took forcible possession of the two slaves, claiming them as his own. It appears he had purchased them of Bowden, the other defendant but a few days before, and with a knowledge of their being hired to the plaintiff. Grayson cautioned the defendant Wooldridge, against taking the negroes. He was also permitted to prove the declaration of Bowden

to Wooldridge, at the time of the sale, "that the negroes were on hire until the first of January and sold with that condition." His testimony was objected to—as also the charge of the District Judge, that no testimony was necessary to prove in what particular part of the Parish the trespass was committed.

There was a verdict and judgment against Woldridge for $100, damage—and judgment of non-suit in relation to Bowden. Wooldridge appealed.

R. C. Scott for plaintiff, contended that it was not necessary to prove the particular part of a Parish in which a trespass is committed, to sustain an action of damages. Code of Practice 3, 31.

Winn submitted the case on the part of the defendant.

Martin J. delivered the opinion of the Court.

The plaintiff claims damages for the wrongful taking out from his possession two slaves, which he had hired for a term as yet unexpired.

The defendant Wooldridge pleaded the general issue, and claimed title to the slaves purchased from his co-defendant.

The plaintiff had a verdict and judgment against Wooldridge with $100 damages.

There was judgment of non-suit against the other defendant. Wooldridge appealed.

When slaves are hired out for a term which is unexpired, and in the mean time the owner sells them to another, if such purchaser take them from the person to whom they are hired before the term expires, he will be answerable in damages as a trefpasser.

The trespass was clearly proved; and it appeared the appellant was informed by his vendor of the slaves being hired out to the plaintiff for a term not yet expired.

There was no evidence given of the place where the trespass was committed, and the petitioner stated no particular place of the Parish. The District Judge charged the jury there was no necessity for such evidence. The defendant's counsel took a bill of exception to this opinion, and relied on the Code of Practice 3. 31.

The Judge also charged the jury that the declarations of

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Wooldridge's vendor at the time of the sale, were legal evidence to prove Wooldridge's knowledge of the right of the plaintiff to retain the slaves.

We think the District Judge did not err. Had a particular place in the Parish been stated in the petition, evidence of the trespass in another part of the Parish would have sustained the charge. This is the law, even in criminal cases.

In an action of trespass it is not necessary to state the trespass happened in any particular part of the parish, because had it been stated, evidence that the trespass was committed in some other place in the parish would have been good, *even in criminal cases.*

The plaintiff who was no party to the deed of sale, might well give evidence of what was said by the parties against either of them.

An effort was made to procure a new trial on account of the excessiveness of the damages. The District Judge thought, and we think with him, that the verdict ought not to be disturbed.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

RIFE vs. HENSON.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

Where an order to take depositions has been made at a previous term, and the plaintiff at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to entitle them to be read in evidence, although the usual affidavit has not been made and annexed.

If an appellant urge that the *subject* of the contract between the parties is illicit and the contract void, after having availed himself of its amount, to plead in re-convention and augment the sum in dispute to 300 dollars and upwards, and be thereby entitled to appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded.

Rife claims of Henson $250 as the price of improvements made on certain Congress lands, according to an agreement with Henson.

Henson denies owing any thing—and says he purchased out all Rife's interest in the improvements in the year 1823. He then sets up claims in re-convention to the amount of $216 for rent of the same lands, and $160 which he alledges he paid for in improving them—and which he also says

are Congress Lands; that the improvements on them were made contrary to law. Rife had a verdict and judgment for 45 dollars.

The defendant objected on the trial to the reading sundry depositions, because the commission under which they were taken, issued without the affidavit required by the Code of Practice. The reading was admitted on the ground, that at a previous term of the Court, a general order had been entered up to take depositions, and this commission was taken out in pursuance of it. A bill of exception was taken to the reading.

R. C. Scott moved to dismiss the appeal on the ground, that the sum appealed from was under 300 dollars. 2 Mar. N. S. 314.

Winn for defendant; maintained the jurisdiction of appeal, because the sum claimed in re-convention exceeds 300 dollars, which alone would give this Court jurisdiction on the appeal.

2. The plaintiff had no right to recover because he sold the improvements which were made on public lands, and which cannot be the subject of sale because contrary to law. Ing. Dig. 362.

3. The exceptions to reading the depositions ought to be sustained, because they were taken contrary to the Code of Practice. Art. 430.

Mathews J. delivered the opinion of the Court.

In this case the plaintiff claims $250 for improvements made on public lands, which sum he alleges the defendant agreed to pay to him for said improvements.

The answer contains a general denial and a plea in re-convention, in which upwards of 300 dollars are claimed. The cause was submitted to a jury, and on the evidence adduced they found a verdict for the plaintiff for the sum of 45 dollars, whereon judgment was rendered and defendant appealed.

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RIFE vs. HENSON.

Where an order to take depositions generally, has been made at a previous term, and the plaintiff, at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to be read in evidence, altho' the usual affidavit has not been made and annexed.

If an appellant urge that the *subject* of the contract between the parties is illicit and the contract void, after having availed himself of its amount to plead in re-convention, and augment the sum in dispute to 300 dollars and upwards, and be thereby entitled to an appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded.

The record contains a bill of exceptions to the reading of answers to interrogatories of witnesses taken by commission, on the ground that the affidavits required by law did not precede said commissions. It appears that at a term of the Court previous to that at which the trial of this cause took place, a general order had been entered on the minutes to take depositions, and that cross interrogatories in pursuance thereof were filed, to the witnesses whose testimony was desired by the plaintiff, at whose instance the commissions issued. The Judge *a quo* was of opinion that the circumstances dispensed with the necessity of the affidavit, otherwise required, and in this we concur with him. On the hearing of the cause before the appellate Court, the counsel for the appellant urged a new means of defence, alleging that the whole contract between the parties is void as being in relation to an illicit subject: because the laws of the United States prohibit all settlements on public lands. This defence comes most *ungraciously* from him after his plea in reconvention, by which alone this Court has jurisdiction of the case. He claims 365 dollars, basing his claim on the same subject matter, alleged by the plaintiff. Such a defence cannot be tolerated at this time.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

FAULK vs. WOOLDRIDGE.

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT THE JUDGE OF THE SIXTH PRESIDING.

In the progress of a suit on a note for the purchase money of a tract of land, the Court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is deficient in quantity, without any affidavit to that effect.

A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of *deficiency* contained in the defendant's answer.

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On the 23d of June 1826, the defendant Wm. Wooldridge and J. J. Bowie, executed their joint note to Vincy Faulk for $600—for the purchase of two tracts of land containing 440 arpens.

The defendant Wooldridge acknowledged his signature to the note, but alleges in his answer that some of the land is in dispute, and is claimed by one Girod: and prays security against eviction, before he shall be compelled to pay the note: he also moved the Court for an order of survey to ascertain the quantity of land in dispute, which was refused.

R. C. Scott explained the case on the part of the plaintiff.

Flint for defendant, submitted it without argument.

Mathews J. delivered the opinion of the Court.

This is a suit against one of the promissors on a note of hand, made by two persons *in solido*; the signature of the defendant to the note was established, and judgment rendered against him, from which he appealed.

The promise was made in consideration of the purchase of a tract of land, which the defendant in his answer, alleges to be deficient in quantity. On the trial of the case he demanded an order of survey from the Court to ascertain that fact, which was refused, and a bill of exceptions taken. The Judge *a quo* refused the order, because the application for it was not supported by the affidavit of the deficiency. In this we are of opinion he was correct. A plaintiff ought not to be delayed in the prosecution of his right, apparently just, by a bare suggestion of the kind contained in the defendant's answer.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

In the progress of a suit on a note for the purchase money of a tract of land, the court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is deficient in quantity, without any affidavit to that effect.

A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of *deficiency* contained in the defendant's answer.

PARGOUD vs. MORGAN & AL.

APPEAL FROM THE COURT OF THE SEVENTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

The proceedings on the cession of the plaintiff's debtors are the best evi-

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dence to show his insolvency; and are admissible as proof when judgment rendered on them is not even signed.

In taking an injunction bond, the officer acts under an authority of law, and inserts the name of the obligees without their consent, so that where one is properly inserted, and another unnecessarily, the bond will be valid as to the right one, and the other nugatory.

In assessing damages on an injunction bond the jury may very properly allow the plaintiff for his reasonable costs and trouble in obtaining a dissolution of the injunction in which the bond was taken.

A plaintiff may release a part of the verdict even before judgment is pronounced upon it, to avoid a motion for a new trial. "Every man may renounce his rights or any part of them."

On the 15th of April 1828, F. Morgan obtained an injunction against an execution in favor of H. Pargoud, which had been levied on several bales of cotton estimated at $400, the property of E. K. Ross; Morgan claimed the property as a creditor of Ross, who is alleged to be in insolvent circumstances. The property was released by the sheriff to Morgan on his executing an injunction bond, with E. K. Wilson his security. Morgan sent the cotton to New-Orleans, sold and pocketed the proceeds.

The injunction was afterwards dissolved, and Pargoud's right to the property seized, established as superior to Morgan's.

Pargoud first sued the sheriff for damages on releasing the property and obtained a verdict for dollars; and now he sues on the injunction bond, and claims the penalty, which is $600, as a remuneration in damages for his loss sustained by the defendants carrying off and selling the cotton. The injunction bond was drawn and made payable to H. Pargoud, whose execution was enjoined, and to the sheriff, jointly.

The defendants plead the general issue. There was a verdict on a second trial for the plaintiff for $355—and he released all to $55 of it before the judgment of the Court was pronounced. The release was given for the surplus damages after deducting what had been recovered from the sheriff.

It was objected on the trial that the bond was not valid, because the name of the sheriff had been improperly inserted as one of the obligees.

1. The District Judge instructed the jury that the bond was taken under an authority of law, and was good as to Pargoud, although it might be bad as to the sheriff, the other obligee. But they could find for Pargoud alone.

2. That they might allow counsels fees in the assessment of damages, which the plaintiff had incurred in dissolving the injunction

3. The record of a suit containing a cession of the property of Ross, to show his insolvency, was offered in evidence, and received: but was objected to because final judgment rendered in it had not been signed by the Judge—a bill of exceptions was taken to its admission by the plaintiff.

This case was argued by *Mr. Winn* as counsel for the plaintiff: and *Mr. Flint* for the defendant.

Martin J. delivered the opinion of the Court.

This is a suit on an injunction bond—the defendants pleaded the general issue, and a tender.

The plaintiff had a verdict for $242 14. He released the whole damages except $55, for which judgment was entered. The defendants appealed.

Three bills of exception were taken. The *first* as to the opinion of the Court who admitted in evidence a judgment pronounced, and entered, but not yet signed, to prove the insolvency of the plaintiff's debtor;

The second was to the Judge instructing the jury that the bond sued on was taken in virtue of an authority given by law, which must be strictly pursued—therefore the name of Jonathan Morgan [the sheriff] one of the obligees, being inserted without his authority, the bond was void as to him; but as to the other obligee, Pargoud, his name being inserted by authority of law, the bond was good as to him.

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The proceedings on the cession of the plaintiff's debtors are the best evidence to show his insolvency; and are admissible as proof when judgment rendered on them is not even signed.

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The *third* was to the opinion of the Court instructing the jury they might take into consideration fees paid by the plaintiff (Pargoud) to have the injunction dissolved.

The proceedings on the cession of the plaintiff's debtor were the best evidence of his insolvency—and they were not the less so from the circumstance of final judgment being as yet unsigned.

The injunction bond is always taken without the consent of the party to be enjoined. The law requires the bond to be made payable to him, and renders it valid without his acceptance. The Judge therefore did not err in saying that as to him the circumstance of the insertion of his name did not vitiate the bond. The other obligee was the sheriff who had levied the execution—his name was unnecessarily inserted. But it does not appear this circumstance prevented the plaintiff from recovering the damages from the defendant; at all events this should have been pleaded in abatement.

In assessing the plaintiff's damages, the jury might well allow him a reasonable sum for his trouble and expense in prosecuting the dissolution of the injunction.

Lastly, it is urged the judgment is erroneus, as it does not follow the verdict as found by the jury.

The Plaintiff released such part of the damages found by the jury as he had received from the sheriff on account of his illegal conduct after the judgment was obtained. It is a common practice for a plaintiff to prevent or defeat a motion for a new trial, by a release of such part of the verdict as was illegally allowed. This can do no injury to the defendant, and every man may renounce his rights, or any part of them.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with damages.

BENSON vs. SMITH.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

A mutual understanding or agreement between the obligor and obligee of

a note, to have the contract for which it is given rescinded, and the note cancelled, will be considered binding, although omitted or neglected to be actually carried into effect; and a recovery on the note will be withheld.

The plaintiff sold to the defendant a lot of ground, opposite to the town of Alexandria, on the river, for $350, with interest. A note was executed, dated March 17, 1819, for 350 dollars. At the time of the sale, a bridge was about to be built across Red River, which would have connected the two sides, and rendered the lot purchased very valuable. The scheme of building the bridge, was soon afterwards abandoned, and the property became comparatively worthless. Benson made a proposition to Smith to rescind the contract, on the latter's agreeing to pay all costs. The latter assented. The parties went to the parish judge's office, to have their new agreement carried into effect, but the judge not being in, nothing more was done in the matter. Benson afterwards left the country, but ordered suit to be instituted against Smith on the note. On the trial, the defendant had a verdict and judgment. The plaintiff appealed.

Flint, for plaintiff, submitted the case without argument.

No counsel appearing for the defendant.

Martin J. delivered the opinion of the court. This is an action on a promissory note. The defendant had a verdict and judgment. The plaintiff made an unsuccessful attempt to obtain a new trial, and appealed.

The execution of the note was admitted, but the defendant drew the following facts from the plaintiff by interrogatories. The note was given for the price of a lot on the side of Red River, opposite to Alexandria, where the plaintiff had laid out a tract of land into lots, several of which he sold. The building of a bridge across the river was, at that time, spoken of. The plaintiff, as well as many others, believed it would take place, but this was not made a part of the contract in the sale of the lots to the defendant.

The plaintiff proposed to the defendant afterwards to

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rescind the sale, on the latter paying all expenses, which he promised to do: And the plaintiff thinks they went together to the court-house to effect this, but not finding the judge there, they parted without doing it; and the plaintiff continued willing to have it done, till his departure from the country, about three years ago, but the defendant never renewed the proposition, or evinced any disposition to avail himself of it.

A mutual understanding or agreement between the obligor and obligee of a note, to have the contract for which it is given, rescinded, and the note cancelled, will be considered binding, altho' omitted or neglected to be actually carried into effect; and a recovery on the note will be withheld

The case has been submitted to us without argument, and it does not appear to us the jury erred. The contract on which the note was given, appeared to us to have been rescinded by the mutual consent of the parties, and a new one entered into, by which the defendant bound himself to pay the expenses attending the sale.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be affirmed with costs.

MADRY vs. YOUNG.

APPEAL FROM THE COURT OF THE SIXTH JUDICIAL DISTRICT, THE JUDGE OF THE FIFTH PRESIDING.

Where A exchanges with B, the negro Jack for Aaron, and takes a bill of sale from B, providing "that if he makes a satisfactory title to Aaron by a particular day, named in the obligation or bill of sale, in that event is to be void—otherwise to be in full force and virtue." The *intent* of such an obligation *is*, that B conveys Jack to A by a title *defeasible*, on his executing a good title to Aaron.

But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchanged him with B, on the aforesaid condition. A will hold Jack in despite of the vendee of B.

John B. Madry purchased the negro Jack, now in suit between the plaintiff and defendant, of one Henry Hunter, in January 1828, for 475 dollars; Hunter had bought him of one Robert Dawson.

Previous to these transactions, and in November 1825, John G. Young, the defendant, purchased the same negro of Jos. Young, who had purchased him at the probate sale of a succession. John G. Young exchanged Jack with Robert

Dawson for another negro, (Aaron): but as Dawson was unable to execute a good title to Aaron, Young refused to make an absolute title to Jack. Dawson then executed an instrument, called in the State of Misissippi, where these transactions took place, a mortgage, which was duly recorded there November 25, 1825, in which he mortgages Jack to Young, for the purpose of securing a good title to Aaron. The mortgage and bill of sale contains the following proviso: that if Dawson, his heirs, etc. shall well and truly make or cause to be made, to the said John G. Young, his heirs, &c. a complete and satisfactory title to the negro Aaron, on or before the first day of January 1828, then and in that case, these presents to be null and void, otherwise to remain in full force or virtue." Dawson never did make any other title to Aaron, but in the mean time sells Jack to Hunter, who sold him to the plaintiff Madry. In May 1828, Young obtained the possession of Jack from Madry by getting the negro on his premises. The present suit was commenced to recover back the negro, who he alleges was *illegally* taken possession of by the defendant; and lays his damages at $500.

The defendant alleges he purchased the negro of Joseph Young, who bought him at the sale of Hook's succession, 25th February 1825.

The jury found a verdict for the plaintiff, restoring him the negro, and 180 dollars in damages, and judgment accordingly.

The District judge charged the jury on the trial, "that if they found Dawson had sold and delivered the slave and received full value for him, it vested the legal title in Hunter and his vendee. This title being sold to Madry without notice, his title would be good. The mortgage sale of Jack by Dawson to Young was conditional, and its effect was to bind Dawson to make a good title to Aaron, or *pay his value*; the title to Jack was only effected to make good the contract.

Dunbar for the plaintiff contended as follows:

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1. The bill of sale or mortgage from Dawson to Young is not valid as to third persons, because it is not an authentic act, or accompanied with delivery. La. Code. Art. 2231. 2415 and 2417.

2. The *Onus probandi* is on the appellant to shew delivery, as it cannot be inferred. The subsequent sales from Dawson to Hunter, and from him to Madry were attended with delivery, were good as to the parties themselves, and as to third persons.

3. There being no evidence to shew the legal effect in Misissippi of the bill of sale from Dawson to Young, it must be construed according to the laws of this state. Starkie. Ev. Part IV. 569, Note X.

C. J. Scott for defendant, urged that the title to the negro Jack had never legally passed to Dawson; and relied on the bill of sale to shew that it never had; and the negro still remained the property of Young.

Martin J. delivered the opinion of the Court. This was an action for the recovery of a slave. The defendant claimed title. At the trial he relied on a bill of sale from Dawson, to which was added a proviso, that if Dawson, his heirs, executors or administrators, shall well and truly make, or cause to be made to the said John G. Young, his heirs, executors, administrators or assigns, a complete and satisfactory title to the negro Aaron, on or before the first day of January 1828, then in that case these presents to be null and void—otherwise to remain in full force and virtue.

Where A exchanges with B, the negro Jack for Aaron, and takes a bill of sale from B, providing "that if he makes a satisfactory title to Aaron by a particular day named, the obligation or bill of sale, in that event is to be void—otherwise to be in full force and virtue:" The *intent* of such an obligation *is*, that B conveys Jack to A by a title *defeasible*, on his executing a good title to Aaron.

But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchang'd him with B, on the a-

The Judge *aquo* instructed the jury that the effect of this sale was to bind Dawson to comply with the conditions, "which were to make a good title to Young, for the other negro given in exchange for Jack, or in default thereof to pay the value of him. The title of Jack was effected to make good this contract." To this part of the charge to the jury the defendant's took a bill of exceptions.

In our opinion, the intention of the parties was not that

Dawson should be bound either to make title for Aaron, or pay the value of him : but to convey to Young a title to Jack *defeasible* by the execution of a proper conveyance or title to Aaron. Certainly Dawson could not have destroyed Young's title to Jack by payment of the value of Aaron. Young's title was on the execution of the instrument he relied on, complete, though defeasible on a subsequent event which does not appear to have happened. It had at once full force and virtue, and by the term of the contract was to *remain* on the event not happening before the day named, in full force and virtue.

foresaid condition. A will hold Jack in despite of the vendee of B.

It is therefore ordered, adjudged and decreed, that the judgment of the District Court be annulled, avoided and reversed—the verdict of the judge set aside, and the case remanded with directions to the judge, not to give to the jury the above part of his charge: the appellee paying costs in this Court.